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Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 256

J. THOMAS MILEY,
Petitioner,
v.
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, BOSTON MUTUAL LIFE INSURANCE COMPANY, CLARENCE W. WYATT AND EDWARD A. GREEN IN OPPOSITION

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Since the "Questions Presented" and "Statement" of the petitioner are misleading and argumentative, the respondents are compelled to set out the following questions presented for review and statement of the case.

Questions Presented

The Court of Appeals in a *per curiam* opinion affirmed an order of dismissal of Judge Ford of the District Court on the memorandum of opinion issued by him. The order

of dismissal followed the allowance of motions to dismiss of the defendants which urged several grounds in support of the contention that the complaint failed to state a claim upon which relief might be granted under the Sherman Act (R. p. 29 and R. p. 33). Record references are to the petitioner's *Record Appendix*.

The questions presented as to these respondents are:

1. Is the decision of the Court of Appeals construing the McCarran-Ferguson Act, 15 U.S.C. 1011-1015, (hereinafter referred to as the McCarran Act) consistent with applicable decisions of this Court and other Courts of Appeals?

2. Is the decision of the Court of Appeals construing section 4 of the Clayton Act, 15 U.S.C. section 15, in conflict with decisions of this Court or other Courts of Appeals?

Statement

The complaint in this case was brought under the Sherman Act, 15 U.S.C., secs. 1 and 15. The plaintiff is an insurance broker licensed in Massachusetts, Maine and New Hampshire. For many years he has been engaged in these states in the business of planning, arranging, negotiating and servicing group insurance contracts for employers with insurance companies in various states for which he has received commissions and service fees when successful (R. p. 9). The defendants are eight Massachusetts insurance companies, four individual officers of three of these companies, and the five members of the Massachusetts State Employees' Group Insurance Commission established by Mass. *General Laws*, Ch. 32A (Acts of 1955, chapter 628). (Hereinafter called the commission).

The allegations of the complaint may be summarized

as follows. In 1955, the Massachusetts Legislature enacted *General Laws*, Ch. 32A to provide a program of group life, accidental death and dismemberment insurance, and group hospital, surgical and medical coverages for employees of the Commonwealth (R. p. 9). The members of the commission in accordance with section 3 of chapter 32A consisted of the Commissioner of Administration and Finance, the Insurance Commissioner, and three appointees of the governor. This section also required the commission to "adopt such reasonable rules and regulations as may be necessary for the administration of this act—." The legislature, in section 4 of the act, directed the commission to "negotiate with and purchase, on such terms as it deems to be in the best interest of the commonwealth and its employees, from one or more insurance companies, savings banks or non-profit hospital or medical service corporations," the group insurance contemplated by the statute; to "execute all agreements or contracts pertaining to said policies or any amendments thereto for and on behalf and in the name of the commonwealth;" to "negotiate a contract for such term not exceeding three years as it may, in its discretion, deem to be the most advantageous to the commonwealth; provided, however, that the portion of the cost of the premium per month to be borne by the commonwealth shall not exceed the estimated monthly cost for which funds have been appropriated by the general court for the then fiscal year;" and permitted "any savings bank authorized to engage in the insurance business—and any non-profit hospital service corporation or non-profit medical corporation—to enter into a reinsurance agreement as herein provided in the same manner as any other insurance company."

Subsequent to November 16, 1955, the commission published an invitation to bid to all insurance companies licensed to do business in Massachusetts for the award

of the group insurance contracts provided by chapter 32A. Such bids or proposals were to be submitted to the commission by December 1, 1955 (R. p. 10). The plaintiff "obtained" a copy of the invitation to bid, and "decided upon and enlisted the cooperation" of Minnesota Mutual Life Insurance Company, a Minnesota corporation (hereafter called Minnesota) and Massachusetts Hospital Service, Inc. (Blue Cross) and Massachusetts Medical Service (Blue Shield) (R. p. 10). On December 1, 1955, the plaintiff submitted a "package" proposal "on behalf of Minnesota and in conjunction with Blue Cross and Blue Shield" (R. pp. 11 and 12). None of these companies is a party to this suit. Among the other nineteen bids submitted by December 1, 1955, there was a joint bid by the defendant insurance companies (except Boston Mutual Life Insurance Company, hereinafter called Boston) of a rate of $1.20 per month per thousand dollars on the life, accidental death and dismemberment coverages (R. p. 12). The rate offered by Minnesota in the "package" proposal submitted by the plaintiff was $.90 per month per thousand dollars for the same coverages (R. p. 16).

Thereupon the commission ascertained from Blue Cross and Blue Shield, and so informed some of the other defendants, that Blue Cross and Blue Shield were willing to offer the same benefits for the medical, surgical and hospital coverages included in their bid with Minnesota in conjunction with any other insurance companies, provided that the rate for the life, accidental death and dismemberment coverages would not exceed the $.90 rate (R. pp. 14 and 15). The defendant insurance companies, except Boston, it is charged, then conspired to meet or better the low bid of $.90 and to eliminate Minnesota as a competitor (R. pp. 15-16). The various insurance company defendants, except Boston, could not offer a rate below the $1.20 rate they had filed with the New York

insurance commissioner without jeopardizing their right to do business in that state. Consequently, Boston, which did no business in New York, was brought into the combination (R. p. 17). On December 30, 1955, Boston successfully met or bettered the low bid of Minnesota, and the contract for the life, accidental death and dismemberment coverages was awarded to it by the commission (R. pp. 18-19). Thereafter, Boston allotted 95% of the total amount of the insurance to the other defendant companies by way of reinsurance (R. p. 18).

The complaint concludes that the plaintiff suffered injury because as a result of the defendants' alleged violation of section 1 of the Sherman Act "Minnesota failed to receive the award of the contract and thereby the plaintiff Miley was deprived of compensation for servicing said contract and commissions and service fees for new business which would have resulted had said contract been awarded to Minnesota" (R. p. 19).

Comment On Petitioner's Statement

Contrary to the misleading comments in the petitioner's Statement (Pet. pp. 5 and 6), it does not follow from the decision of Court of Appeals that "the Sherman Act will not apply to the business of insurance in states which have regulated that business even to the slightest degree—;" that "plaintiffs in thirty-two states who are injured by violations of the Sherman Act in the insurance industry are left completely without any type of relief;" and that "the Congressional intent in enacting the McCarran Act is ignored." The decision is based on the facts pleaded in the complaint. The grounds for affirming the order dismissing the complaint pursuant to the defendants' motions to dismiss are simply as follows (R. pp. 29-33):

1. The Sherman Act did not apply to the activities of the defendants described in the complaint by reason of the McCarran Act, since Massachusetts law provided "a statutory scheme of regulation covering the very transaction complained of."

2. The plaintiff failed to allege an injury to his business or property which would entitle him to bring an action under section 4 of the Clayton Act, 15 U.S.C. sec. 15, since the injuries alleged were remote and speculative.

a. Any loss to the plaintiff of fees for servicing the group contract flowed indirectly from the failure to award to Minnesota a contract to which it was never legally entitled.

b. The plaintiff had no legal right to such fees but only "a mere hope that he would be hired by Minnesota to service the policies and thus be given a chance to earn the fees."

c. Any loss to the plaintiff of commissions and fees on future business was based "only on the expectation that if Minnesota secured this contract with the Commonwealth, its prestige would be increased which might lead to an increase in its business here on which plaintiff might become entitled to fees and commissions."

3. There is no federal jurisdiction of the suit against the members of the state commission, since it is in substance an action against the state itself and the state has not waived its immunity.

Summary of Argument

It is submitted that the grounds of decision of the Court of Appeals for the First Circuit in this case are correct, and consistent with decisions of this Court and other Courts of Appeals. The construction of the McCarran Act by the Court of Appeals in exempting the transaction described in the complaint from the operation of the Sherman Act is supported by a decision in the Eighth Circuit, and is wholly consistent with decisions of this Court and other Courts of Appeals defining the application of the Sherman Act to the business of insurance. Finally, the holding in this case that the plaintiff's claim of injury to his business or property was too remote and speculative to entitle him to relief under section 4 of the Clayton Act is not in conflict with any decision of this Court or of other Courts of Appeals.

Argument

I

The Decision of the Court of Appeals Construing the McCarran Act Is Consistent with Applicable Decisions of this Court and Other Courts of Appeals

The Court of Appeals decision, insofar as it relies on the McCarran Act in concluding that the Sherman Act is not applicable to the activities of the defendants in the context of the complaint in this case, in no way suggests the alarming consequences conjured up by the petitioner (Pet. pp. 12-13). No insurance industry behemoth is being unleashed to spread unlawful conspiracy across the land. The holding on the McCarran Act point is simply that the activities about which the plaintiff complained were regu-

lated and authorized by Massachusetts law, and that, therefore, the Sherman Act was inoperative by virtue of the McCarran Act. As the District Court decision expressed it, "Assuming that what was done here by the defendants would under other circumstances constitute a conspiracy or combination violative of the Sherman Act, it was nevertheless done in the course of, negotiation authorized and regulated by an applicable state law, and as to such transactions Congress has expressly provided that the Sherman Act shall not apply" (R. p. 30).

The Court of Appeals' decision in adopting this construction of the McCarran Act is wholly consistent with the decisions of this Court and other courts which have considered the application of the Sherman Act to the business of insurance.

State Regulation of the Business of Insurance Prior to the McCarran Act

From its decision in 1869 in *Paul* v. *Virginia*, 8 Wall. (U.S.) 168 to 1944 this Court consistently held that the business of insurance was not commerce, and was subject to regulation by the states.

U.S. v. *South-Eastern Underwriters Association*, 322 U.S. 533, 543-544, and cases cited.

Congress in passing the Sherman Anti-Trust Act in 1890 made no attempt to apply it to insurance. Comprehensive state regulation of insurance although opposed to the Sherman Act was repeatedly upheld by the courts.

O'Gorman & Young Inc. v. *Hartford Fire Ins. Co.*, 282 U.S. 251.

Hoopeston Canning Co. v. *Cullen*, 318 U.S. 313.

Werth v. Fire Companies Adjustment Bureau, 160 Va. 845, cert. den. 290 U.S. 659.

Then on June 5, 1944, it was held in a 4-3 decision in the *South-Eastern* case, supra, that a violation of the Sherman Act had been effectively pleaded on the basis of ample allegations in an indictment that aspects of the defendants' insurance business were in interstate commerce, and that the defendants were employing boycott, coercion and intimidation in the furtherance of a conspiracy.

While recognizing that the Sherman Act could apply to the insurance business upon the facts alleged in the *South-Eastern* indictment, this Court placed significant limitations on the type of activities in the business of insurance to which the Sherman Act would apply, and for which the states would be denied the power to regulate. It was stated by the Court at pages 548-549:

> "It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. *And there is a wide range of business and other activities which, though subject to federal regulation are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states.* In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. . . ." (emphasis supplied.)

During the interval before Congress restored to the states the power to regulate the insurance business, several courts applied the limitation described in the *South-Eastern* case in upholding state regulation of various phases of the insurance business.

Robertson v. *California*, 328 U.S. 440.

(California criminal statutes requiring an agent for a foreign insurer to be licensed by the state Insurance Commissioner and excluding foreign insurers which did not operate on a legal reserve basis held valid exercises of the police power.)

Ware v. *Travelers Ins. Co.*, (C.A. 9) 150 F(2d) 463.

(Idaho statute requiring a foreign insurer to write policies of insurance in Idaho through a resident agent and to pay him a stipulated commission held within the *South-Eastern* exception.)

First National Beneficial Society v. *Garrison* (D.C.S.D. Calif.) 58 F.S. 972.

(Cash reserve requirements of California insurance statute for foreign insurers held valid under *South-Eastern* case).

Mendola v. *Dineen*, 185 Misc. 540.

(N.Y. statutes providing for the licensing of agents of foreign insurers by the Superintendent of Insurance so as to "best promote the interests of the people of this state" and for the licensing of foreign insurers held valid on the authority of *South-Eastern* case).

Certainly it would appear that even before Congress acted, on the authority of the *South-Eastern* case the activities of the defendants in the case at bar in the negotiation and purchase of a group insurance policy by the Commonwealth for its own employees were so intimately related to local welfare that the Sherman Act would not

apply, even if it is assumed for purposes of argument, that the other elements of a Sherman Act violation were present. In weighing the competing demands of the state and national interests involved, reason and sound principles of comity dictate that a state should have the power to regulate the award of a contract by itself on its own employees.

B. The McCarran-Ferguson Act.

In any event, all doubts or questions as to the validity of state regulation of the insurance business were set to rest by the enactment on March 9, 1945 of the McCarran-Ferguson Act (59 Stat. 33; 15 U.S.C. secs. 1011-1015; full text in appendix of this brief). Its title describes it as "An Act to express the intent of the Congress with reference to the regulation of the business of insurance."

In its first sentence the Act states:

> "That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, . . ."

Sec. 2 (a) provides:

> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

Sec. 2 (b) provides:

> "No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any

State for the purpose of regulating the business of insurance, unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Congress' purpose in enacting the McCarran Act was obviously to acquiesce in the regulation by the states of the business of insurance. The Sherman Act was not to apply to the business of insurance to the extent that it was regulated by state law. Nothing in the Act requires that the state regulatory law be a facsimile of the Sherman Act.

Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408, 429-430.
Wilburn Boat Co. v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, rehearing denied 349 U.S. 907.
American Universal Ins. Co. v. *Sterling* (C.A. 3) 203 F(2d) 159, 163.
North Little Rock Transportation Co. v. *Casualty Reciprocal Exchange*, (C.A. 8) 181 F(2d) 174, cert. den. 340 U.S. 823.

See: 15 *Contemporary Law and Problems* 473.

Thus in the *Wilburn Boat Co.* case, supra, at page 319, this Court said:

"In the *South-Eastern* case . . . all the opinions had emphasized the historical fact that States had always

been free to regulate insurance. The measure Congress passed shortly thereafter known as the McCarran Act was designed to assure that existing state power to regulate insurance would continue."

In the *North Little Rock Transportation Co.* case, supra, the question of the application of the Sherman Act in the light of regulation of insurance business by state law was squarely raised. It was held that the activities of a group of insurance companies, pursuant to an Arkansas statute authorizing the fixing of insurance rates, were exempt from the Sherman Act by virtue of the McCarran Act. This conclusion was reached although a combination to fix prices is per se a violation of the Sherman Act.

Again the third circuit in construing the McCarran Act in its decision in the *American Universal Ins. Co.* case, supra, stated at page 163, "The McCarran Act changed the rule of that case (i.e. the *South-Eastern* case) and upheld existing and future state systems for regulating the business of insurance . . . ."

The petitioner has failed to offer any decision of this Court, or to indicate any Court of Appeals' decision which supports his construction of the McCarran Act. On the other hand, the decisions which have been cited in this brief are quite consistent with the construction of the act which has been made by the Court of Appeals in this case.

C. Regulation of defendants' alleged conduct by Massachusetts law.

The alleged conduct of the defendants for which the plaintiff claims he is entitled to relief under the Sherman Act consists of their activities in the business of insurance in negotiating for the purchase of a policy of life, accidental death and dismemberment insurance. It is sub-

mitted that these activities were regulated by Massachusetts law, and therefore, by reason of section 2 (b) of the McCarran Act were exempt from the Sherman Act if that law were otherwise applicable. The General Laws of Massachusetts afford a comprehensive body of statutory law regulating the various activities and transactions in the insurance business which are the subject of this complaint.

1. Regulation by General Laws (Ter. Ed.) Chapter 32A.

General Laws (Ter. Ed.) Chapter 32A provided for the adoption of an insurance program for officers and employees of the Commonwealth. By it, the Massachusetts Legislature intended to enact and succeeded in enacting a law to regulate all phases of the business of negotiating the insurance policy for its employees which is the subject of the complaint. Until this chapter was enacted, no group insurance program for such State officers and employees, to the cost of which the Commonwealth would contribute, was possible. Since the Commonwealth had decided to defray part of the cost of the program, it obviously was interested in regulating the entire program. The Commonwealth's Legislature established the state employees' group insurance commission and provided that its members must meet certain requirements. One of its members was the state commissioner of insurance, the official charged by statute with the administration of the state laws regulating the insurance business; another was the Massachusetts commissioner of administration of finance; and the other three were appointees of the governor. That legislation further required the commission to "adopt such reasonable rules and regulations as may be necessary for the administration of this act . . ." (Section 3). Section

4 of the Act directed the commission to "negotiate with and purchase on such terms *as it* deems to be *in the best interest of the commonwealth and its employees*, from one or more insurance companies, savings banks or non-profit hospital and medical service corporations," the group insurance contemplated by the statute; to "execute all agreements or contracts pertaining to said policies of any amendments thereto *for or on behalf* and *in the name of* the commonwealth;" to "negotiate a contract for such term not exceeding three years as it may *in its discretion* deem to be the most advantageous to the commonwealth." (Emphasis supplied) This same section also placed a specific limit on the cost of the premium to be borne by the commonwealth, and it contemplated reinsurance agreements. Since Chapter 32A affords comprehensive regulation of the matters about which the plaintiff complains, the Sherman Act is rendered inapplicable.

North Little Rock Transportation Co. v. *Casualty Reciprocal Exchange*, supra, (C.A. 8) 181 F(2d) 175, cert. den. 340 U.S. 823.

2. Regulation by General Laws (Ter. Ed.) Chapter 176D.

It is the respondents' position that the defendants' conduct which is the subject of the complaint constituted an insurance transaction which was authorized and regulated by Chapter 32A. But even assuming for purposes of argument that the complaint effectively charges unfair methods of competition on the part of the defendants and that Chapter 32A does not apply, such offensive conduct was still regulated by Massachusetts law and exempt from the Sherman Act.

General Laws (Ter. Ed.) Chapter 176D was enacted subsequent to the adoption of the McCarran Act. The purpose of Chapter 176D is set forth in Section 1 as follows:

> "The purpose of this chapter is to regulate trade practices in the business of insurance *in accordance with the intent of congress as expressed* in the act of congress of March nine, nineteen hundred and forty-five (Public Law 15, 79th Congress), by defining, or providing for the determination of, *all* such practices in this commonwealth which constitute *unfair methods of competition* or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (Emphasis supplied).

Section 4 specifically defines certain unfair methods of competition and unfair deceptive acts or practices in the business of insurance.

Section 9 provides:

> "(a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this commonwealth in any method of competition or *in any act or practice* in the conduct of such business which is not defined in section four, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by the commissioner in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon . . ." (Emphasis supplied).

Further provisions of Section 9 outline the procedure for enjoining the continuance of such practices.

Examination of the various sections of Chapter 176D indicates that the Legislature intended to regulate "*all* such practices in this commonwealth which constitute unfair methods of competition or unfair or deceptive acts or practices" in the business of insurance (Section 1). Some restraints of the insurance business and monopolization of any part of it have been specifically defined as unfair methods of competition. The Legislature expressly stated in Section 1 that it intended to regulate *all* trade practices constituting unfair methods of competition. Section 9 would clearly cover any unfair method of competition not defined in Section 4, and provides the remedy to enjoin such methods. Chapter 176D then is the pertinent state regulatory law insulating the defendants' conduct from the operation of the Sherman Act even if it can possibly be concluded that Chapter 32A is inapplicable and that unfair methods of competition have been effectively charged against the defendants.

3. Regulation by other statutory law.

As pointed out in the District Court decision, Massachusetts provides a comprehensive statutory scheme for the regulation of all phases of the insurance business, *General Laws* (Ter. Ed.) Chapters 174A through 178 (R. p. 30). Chapter 175 includes a number of regulatory provisions pertaining to acts of the defendants upon which the plaintiff has relied in his effort to state a claim under the Sherman Act.

This chapter contains numerous provisions on reinsurance including a provision on the status of reinsurance contracts (Sec. 2A), requirements as to the type of companies in which reinsurance can be placed, and limitations on the right of domestic companies to reinsure without the consent of the commissioner of in-

surance (Sec. 20). There are also restrictions on the size of any single risk a company may cover without reinsuring (Sec. 21).

Other provisions define the circumstances in which group insurance policies may be written (Sec. 133), specify the terms that must be contained in them (Sec. 134), and require the approval of their contents by the commissioner (Sec. 134).

Sections 29, 47, Sixth (a) and (d) and 54 furnish a complete answer to the plaintiff's charge that Boston could not legally execute a contract for accidental death and dismemberment insurance since its 1891 charter was never amended to include other classes of insurance than life insurance on the assessment plan (R. p. 18). By virtue of these regulatory sections, Boston was enabled to transact accidental death and dismemberment insurance business without any amendment of its charter.

II

The Decision of the Court of Appeals Construing Section 4 of the Clayton Act Is Not in Conflict with Decisions of this Court or Other Courts of Appeals

Relative to this point the Court of Appeals decision was that the plaintiff was not entitled to the treble damage remedy under section 4 of the Clayton Act since the injuries he alleged were remote and speculative (R. pp. 31-32). The plaintiff's claim to fees for servicing the group contract was held to flow indirectly from the commission's failure to award to Minnesota a contract to which it was never legally entitled and it was further held that the plaintiff himself never had any legal right to such fees but only "a mere hope that he would be hired by Minnesota to service the policies and thus be given a chance to earn

the fees" (R. p. 32). As to the plaintiff's claim for the loss of commissions and service fees on future business (R. p. 19), it was held that it was based "only on the expectation that if Minnesota secured this contract with the Commonwealth, its prestige would be increased which might lead to an increase in its business here on which plaintiff might become entitled to fees and commissions" (R. p. 32).

The petitioner does not assert that these holdings are in conflict with any decision of this Court, but charges that they disregard "a recent admonition of this Court" (Pet. pp. 29-31). The decision of this Court, *Radovich* v. *National Football League*, 352 U.S. 445, relied on by the petitioner is in no sense at variance with the holdings of the Court of Appeals for the First Circuit. The *Radovich* case was concerned with the completely different problem of the application of the Sherman Act in the field of professional sports. This Court expressly recognized that the petitioner in that action, in order to avail himself of the remedy under section 4, had to show that he had suffered injury by reason of the alleged violation of the Sherman Act and that he was an aggrieved party. These requirements were met by the allegations of the complaint that the unlawful conspiracy involved a boycott directed against the petitioner for the purpose of preventing him from obtaining employment as a player-coach.

In the case at bar, the gravamen of the Court of Appeals decision is that the plaintiff did not allege the direct injury which was required for relief under section 4. Instead of charging an unlawful conspiracy directed against himself, the plaintiff alleged that the conspiracy was against Minnesota and that "thereby the plaintiff" incurred his alleged injuries (R. p. 9). Obviously, if Minnesota had no legal right to the award of the group contract, which it is alleged it did not receive because of an illegal con-

spiracy, the plaintiff had no legal right to the compensation which he has claimed, and therefore did not incur any injury to his business or property which would permit relief under section 4. For it is fundamental that the "injury" contemplated by section 4 "implies violation of a legal right." *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163.

It is clear that Minnesota did not have a legal right to receive the award of the contract. *General Laws* (Ter. Ed.) Chapter 32A fixed the terms for the award of the group contract. It did not require in any form of language that the contract be awarded to the bidder who offered "the greatest amount of benefits" or even to the lowest bidder. Instead, the award was to be made by the commission on such terms as it deemed to be in the best interest of the Commonwealth and its employees. More appropriate language for an uninhibited exercise of discretion by the commission can hardly be imagined. None of the allegations can be construed as conferring a legal right on Minnesota to receive the award of the group contract, and therefore that company has no cause of action under section 4. Since the plaintiff's right to compensation depends on the legal right of Minnesota to receive the award of the contract, the plaintiff has no legal right to compensation and no remedy under section 4. Any economic loss of Minnesota or the plaintiff as a result of anything forbidden in the anti-trust laws is wholly conjectural and speculative.

As the court as aptly stated it in the case of *A. J. Goodman & Son* v. *United Lacquer Mfg. Corp.*, (D.C. Mass.) 81 F. S. 890, 893, where the plaintiff sought treble damages for the loss of a contract to supply lacquer to the state of New Hampshire, allegedly caused by an anti-trust violation of the defendant in making an unreasonably low bid for the contract, "if as seems to be the case, the

lowest bidder is not assured of the contract, any harm resulting from a violation by the defendant becomes purely speculative."

Keogh v. *Chicago & N.W. Ry. Co.*, supra, 260 U.S. 156.
Okefenokee Rural Electric Membership Corp. v. *Florida Power & Light Co.*, (C.A. 5) 214 F(2d) 413.
Hudson Sales Corp. v. *Waldrip*, (C.A. 5) 211 F(2d) 268.
A. J. Goodman & Son v. *United Lacquer Mfg. Corp.*, (D.C. Mass.) supra, 81 F.S. 890.
Corey v. *Independent Ice Co.*, (D.C. Mass.) 207 F. 465.
Admiral Theatre Corp. v. *Paramount Film Distributing Corp.*, (D.C. Nebr.) 140 F.S. 686.

In addition, as held by the Court below, the plaintiff did not allege any personal legal right to fees for servicing the group contract in question (R. p. 32). There are no averments establishing a legal right of the plaintiff to collect a service fee from the Commonwealth if Minnesota had won the group contract. All that the Commonwealth did was to invite the submission of proposals for the group contracts to the commission. Nothing indicates that it ever agreed, either expressly or impliedly, to pay a service fee to the plaintiff or to any of the persons involved in the eighteen other bids allegedly submitted to the commission (R. p. 12).

The alleged pattern of payment to the plaintiff, when successful, of commissions and/or service fees for "planning, arranging, negotiating and servicing group insurance contracts for employers . . . and acting in their behalf with insurance companies . . ." (R. p. 9) certainly cannot give rise to a legal obligation of the Commonwealth, which is in the position of an employer in this case, to pay the plaintiff a service fee.

In *Cronin* v. *National Shawmut Bank*, 306 Mass. 202, it was held that the plaintiff, an insurance broker, was not entitled to a commission from the defendant where he submitted a proposal for insurance in response to the defendant's invitation, and the defendant awarded the insurance business, on substantially the same terms proposed by the plaintiff, to a second broker, because it wished him to receive a commission. The Supreme Judicial Court said at page 210:

> "A mere indication of a willingness to receive proposals is not an offer which can ripen into a contract upon the submission of a proposal. There is no obligation to accept the most favorable proposal received or to accept any proposal at all. Any or all may be rejected for any reason or without any reason . . ."

Similarly the complaint contains no allegations from which it can be said that Minnesota was under any obligation to pay a service fee to the plaintiff if it had been awarded the group contract. It is simply charged that the plaintiff "decided upon" Minnesota and enlisted its cooperation. These are hardly phrases upon which any contractual obligation of Minnesota to pay a service fee to the plaintiff can be supported.

The decision of the Court of Appeals that the plaintiff's claim of injuries was remote and speculative is even more emphatic when applied to the plaintiff's allegation of damages for loss of "commissions and service fees for new business which would have resulted had said contract been awarded to Minnesota" (R. p. 19). No court could ever hope to assess damages for the vague and illusory losses which the plaintiff has asserted here.

American Sea Green Slate Co. v. *O'Halloran*, (C.A. 2) 229 F. 77.

The petitioner's further contention that the decision of the Court of Appeals for the First Circuit on this point is in direct conflict with decisions of Courts of Appeals for other Circuits is without merit.

Roseland v. *Phister Mfg. Co.*, (C.A. 7) 125 F(2d) 417 (Pet. pp. 29, 30 and 32) in no way conflicts with the decision in this case. The plaintiff in that action was held to have a remedy under section 4 of the Clayton Act when the defendants, in violation of a Federal Trade Commission cease and desist order, prevented him from selling fire prevention equipment in certain territories where the plaintiff, by virtue of an exclusive agent's contract with one of the defendants of more than fifteen years' duration, had a legal right to bid. In reaching this conclusion the court recognized, at page 419, that there were persons whose injuries were so remote and speculative that they would not be entitled to a treble damage remedy. In this 1942 decision the court cited as authorities for this proposition the cases of *Corey* v. *Independent Ice Co.*, supra, (D.C. Mass.) 207 F. 459 and *Noyes* v. *Parsons*, (C.A. 9) 245 F. 689. The *Roseland* decision is certainly not, as contended by the petitioner, an express rejection of the theory that a plaintiff whose injuries are indirect and speculative may not sue under section 4 of the Clayton Act. The holding and reasoning of that court are quite in line with the First Circuit's decision.

Again there is no conflict between the Seventh Circuit's opinion in *Congress Building Corporation* v. *Loew's Incorporated*, (C.A. 7) 1957 Trade Cases (C.C.H.), par. 68,725 and the decision in the instant case as urged by the petitioner (Pet. p. 31). The *Congress Building Corporation* case is the only one in which a Circuit Court has concluded

that a non-operating lessor of a motion picture theatre under a percentage lease can maintain an action under section 4 of the Clayton Act for injuries allegedly sustained by reason of an anti-trust violation. In the Second and Third Circuits where the same question has arisen, the Courts have denied the treble damage remedy to the lessor.

Harrison v. *Paramount Pictures, Inc.*, (D.C.E.D. Pa.) 115 F.S. 312, aff'd. (C.A. 3) 211 F(2d) 405, cert. den. 348 U.S. 828.

Melrose Realty Co., Inc. v. *Loew's Inc.*, (C.A. 3) 234 F(2d) 518, cert. den. 352 U.S. 890.

Westmoreland Asbestos Co. v. *Johns-Manville Corp.*, (D.C.S.D. N.Y.) 30 F.S. 389, aff'd. (C.A. 2) 113 F(2d) 114.

In *Steiner* v. *20th Century-Fox Film Corp.* (C.A. 9) 232 F(2d) 190, the court did not refuse to follow the rule of the *Harrison* case, supra, as erroneously stated by the petitioner (Pet. p. 31), but recognized the validity of the *Harrison* holding and distinguished the *Steiner* facts from those involved in the *Harrison* litigation.

See: *Steiner* v. *20th Century-Fox Film Corp.*, supra, (C.A. 9) 232 F(2d) 190, 193.

In no event is there any conflict between the decisions in the *Congress Building Corporation* and *Steiner* cases, on the one hand, and the decision of the First Circuit in this case. The posture of the plaintiffs in those cases, as far as a direct invasion of their legal rights was concerned, was quite different from that of the petitioner in the case at bar. The reality of this distinction was acknowledged by the Court in the *Congress Building Corpo-*

ration case at page 72,959, when it noted the degree of uniformity in denying treble damage relief in a group of cases involving "factually dissimilar situations". One of the cases listed by the Court in this grouping is *Miley v. John Hancock Mutual Life Ins. Co.*, (D.C. Mass.) 148 F.S. 299. The other cases included in this list denied section 4 recovery to creditors, deposed officers of a corporation, a patentee, and a supplier of a victim of an alleged anti-trust violation.

Gerli v. Silk Ass'n of America, (D.C. S.D. N.Y.) 36 F(2d) 959.

Loeb v. Eastman Kodak Co., (C.A. 3) 183 F. 704.

Corey v. Independent Ice Co., supra, (D.C. Mass.) 207 F. 465.

Productive Inventions Inc. v. Trico Products Corp., (C.A. 2) 224 F(2d) 678, cert. den. 350 U.S. 936.

Snow Crest Beverages, Inc. v. Recipe Foods, Inc., (D.C. Mass.) 147 F.S. 907.

A further clarification of the position of the Court of Appeals for the Ninth Circuit, which decided the *Steiner* case, is found in its decision in *Conference of Studio Unions v. Loew's, Inc.*, (C.A. 9) 193 F(2d) 51, cert. den. 342 U.S. 919. There an injury to a union of movie workers based on an anti-trust violation directed against movie companies to which the union supplied workers was held too remote and incidental to the accomplishment of the alleged illegal object to support a treble damage suit.

On page 32 the petitioner has cited the cases of *Roseland v. Phister Mfg. Co.*, supra, (C.A. 7) 125 F(2d) 417; *Vines v. General Outdoor Advertising Co.*, (C.A. 2) 171 F(2d) 487; *McWhirter v. Monroe Calculating Machine Co., Inc.*, (D.C. W.D. Mo.) 76 F.S. 456 and *Klein v. Sales Builders, Inc.* (D.C. N.D. Ill. 1950-1951 Trade Cases

(C.C.H.) Par. 62,950 as involving plaintiffs in the same position as the petitioner in this case. This is not so, since in each of the cases relied on by the petitioner the plaintiff had a legal right to commissions or salary by virtue of a sales or employment contract, and the alleged anti-trust violation in each case was directed against the plaintiff. In our case the theory of the complaint is that the unlawful conspiracy was directed against Minnesota, and that "thereby the plaintiff" suffered his alleged injuries (R. p. 19). Moreover, as established in this brief, the petitioner never had a legal right to the fees for servicing the group contract or to the ephemeral "commissions and service fees for new business which would have resulted had said contract been awarded to Minnesota" (R. p. 19). The statement by the petitioner that he has not relinquished any interest in his brokerage business as was done by the plaintiffs in the *Melrose Realty Co.* and *Productive Inventions'* cases, supra, is quite meaningless (R. p. 32). His assertion disregards the established fact that he never had any legal interest in the service fees and future commissions for the loss of which his complaint seeks damages. In the absence of any legal right or property interest in such compensation the petitioner, of course, could not relinquish it.

Conclusion

It is submitted on the foregoing points and authorities that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

The McCarran Ferguson Act

PUBLIC LAW 15—79TH CONGRESS

CHAPTER 20—1ST SESSION

S.340

AN ACT

To express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the ~~several~~ States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, the Act of

July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

Approved March 9, 1945.